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No. 90-

in the Supreme Court of the United States

OCTOBER TERM 1990

KEVIN KING, as father and next friend of BEN KING, a minor, and KEVIN KING and MARY JO KING, individually,

Petitioners,

vs.

EASTERN AIRLINES, INC., a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

WHETHER "WILLFUL MISCONDUCT" UNDER THE WARSAW CONVENTION CAN PROPERLY BE GOVERNED BY A STATE LAW STANDARD WHICH REQUIRES CONDUCT "SO OUTRAGEOUS IN CHARACTER, AND SO EXTREME IN DEGREE, AS TO GO BEYOND ALL POSSIBLE BOUNDS OF DECENCY AND BE REGARDED AS ATROCIOUS, AND UTTERLY INTOLERABLE IN A CIVILIZED COMMUNITY"?

PARTIES TO PROCEEDING

The only persons and entities who have an interest in the outcome of this case are Petitioners and Respondent.

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EASTERN AIRLINES, INC., a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners, Kevin King, as father and next friend of Ben King, a minor, and Kevin King and Mary Jo King, individually, petition for a writ of certiorari to review the judgment and decision of the Supreme Court of Florida in this case which denied review of the judgment and decision of the Third District Court of Appeal of Florida.

CITATION OF REPORTED OPINIONS

The Third District Court of Appeal of Florida reversed the jury verdict in favor of the Kings and limited their recoverable damages in *Eastern Airlines, Inc. v. King*, 561 So.2d 1220 (Fla. 3d DCA 1990), *rev. denied*, No. 76,434 (Fla. Jan. 8, 1991). That decision is reproduced in the Appendix. The Third District summarily relied on, and thereby incorporated, the Florida Supreme Court holding in *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990), a case involving another passenger in the same near-crash, which is also reproduced in the Appendix.

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION

Jurisdiction in this Court is sought to review the judgment of the Supreme Court of Florida entered January 8, 1991, pursuant to 28 U.S.C. § 1257. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (jurisdiction to resolve conflict between circuits concerning application of Warsaw Convention).[1]

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[1]The matter sought to be reviewed is a final judgment for purposes of § 1257, although the intermediate state appellate court has remanded for a new trial on damages as to one of the parties. The Third District Court of Appeal limited Ben King's damages as a matter of law. Although it remanded for further proceedings as to Ben's father, the limitation on damages will also apply to his recovery under the state court's definition of "willful misconduct". *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975). "[T]he requirement of finality is to be given a 'practical rather than a technical construction'." *Id.* at n.7 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). *See also Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983).

TREATY INVOLVED

The following portions of the Warsaw Convention are at issue in this case. The full text of the entire treaty is contained in the Appendix.

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default of his part, as in accordance with the law of the court to which the case is submitted.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 25, Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted* 49 U.S.C.A.App. § 1502, note, *modified by* Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-18680, May 13, 1966, 31 Fed.Reg. 7302 (1966) [Montreal Agreement].

STATEMENT OF THE CASE AND FACTS

A. *Presentation of federal question below.* The federal question presented in this case was timely raised in the trial court, was specifically addressed by the trial judge and was specifically addressed by the Florida appellate court. The question is whether the Kings' recovery is limited by the $75,000 limitation in the Warsaw Convention or whether they proved "willful misconduct" at trial which

would permit them to recover in excess of that limitation. Eastern moved for a directed verdict during trial on the issue of "willful misconduct". In an interrogatory verdict, the jury found "willful misconduct" on the part of Eastern's employees. On appeal to the Third District Court of Appeal of Florida, the court summarily applied the decision of the Florida Supreme Court in another case which arose out of the same near-crash, *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990), a case which equates the federal standard of "willful misconduct" with the wholly different concept of intentional infliction of emotional distress under state law.

B. *Facts and procedural history.* Ben King's pregnant mother was aboard an international Eastern flight which almost crashed. Ben was born four months prematurely because of the trauma of the incident. He is brain damaged and blind. The Kings sued Eastern. The evidence at trial showed that the near-crash occurred because Eastern's mechanics never checked to see if an o-ring, a part which they knew was a critical safety component, was present when they installed a chip detector on each of the plane's three engines. All the mechanics had to do was look at the chip detector before they installed it. They did not do so. The mechanics then falsified their work cards to show that they had performed the various safety checks which they knew they had not performed.

The mechanics admitted that they intentionally violated safety rules and regulations, even though they knew that the o-rings were critical safety components. (T. 202-74, 426-43, 1456-82; R. 769-896, 975-1032). For example, one of the mechanics testified that it was his habit never to look at the chip detector to see if the o-rings were there. (T. 235). Yet he signed the work card, knowingly violated company safety procedures and lied about whether he had checked the part. (T. 237-38, 239-40). The other mechanic admitted

that both of them knew they had almost killed this plane full of people because of their conduct. (T. 1467-68).

Eastern's mechanics admitted that they knowingly engaged in misconduct which caused the near-crash:

Q: Did you feel for the seals on that replacement part?

A: No, I didn't.

Q: Did you look to see whether or not it had seals on it?

A: I don't believe I did.

Q: *Was it your responsibility to look at it to see whether or not it had seals on it?*

A: *Yes, sir.*

Q: Did you *know* at that time that that was your responsibility, to look at it and see that it had seals on it?

A: *Yes, sir.*

Q: *Were you aware at that time that if it did not have seals on it, that the engine could stop in flight because of the loss of oil?*

A: *Yes, sir.*

(R. 1004-05) (emphasis added). The mechanics also admitted they knew that the likely consequences of their misconduct were catastrophic:

Q: You broke the rule that requires you to look at the seal, before you put the chip detector in, and by doing that, you are disregarding the consequences of what will happen to the airplane if it did not have a seal on it?

A: Yes, sir.

(T. 1472).

Q. And you knew it was absolutely critical to the safety of the passengers that the seals are installed when you put the new chip detector in?

A. Yes, sir.

* * *

Q. And the fact is that was confirmed, the critical nature of this, by the fact that what you and Mr. Burris did almost killed everybody on this airplane? Is that correct?

A. I believe so, yes.

(T. 1467-68). See also (T. 270) (mechanics knew that "the safety of every person on the plane depended on [them] doing this job correctly").

Based on these admissions the trial court announced it would direct a verdict in favor of the Kings on the issue of willful misconduct under the Warsaw Convention if the jury did not find in their favor. The court instructed the jury to find willful misconduct if the mechanics

intentionally violated safety rules and regulations with knowledge that the violation would probably result in injury or damage, or intentionally violated safety rules and regulations with reckless disregard of the consequences.

(T. 1669).[2] The jury found for the Kings. But it awarded less than Kevin King's uncontested economic losses. The trial court found the damage award inadequate and ordered a new trial on damages. Eastern appealed.

While that appeal was pending, the Florida Supreme Court decided another case which involved an unrelated passenger, also named King, on the same flight. *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990) [hereinafter "*Charles King*"].[3] That case ruled on the sufficiency of the complaint as to various issues. The primary issue was whether the complaint stated a cause of action for intentional infliction of emotional distress under state law. The Florida Supreme Court determined that such a cause of action existed under state law only if "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . ". 557 So.2d at 576. It held that the case before it did not state such a claim. The Florida Supreme Court then held that its determination under state law compelled the conclusion that the complaint also was insufficient to establish willful misconduct under the Warsaw Convention.

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[2]Eastern's requested jury instruction was quite similar: "the violation [of safety rules] would constitute wilful misconduct if it was done intentionally and with a wanton and reckless disregard of the probable consequences". (SR).

[3]This Court has granted certiorari and heard oral argument in a third case arising out of the same near-crash. *Floyd v. Eastern Airlines, Inc.*, No. 89-1598 (oral argument Oct. 29, 1990).

> We have already determined that King's allegations are not sufficient to support a claim for recklessness or intentional conduct [under state law]. It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct".

557 So.2d at 578.

The Kings' trial contained substantial evidence that Eastern's mechanics were guilty of "willful misconduct", i.e., they intentionally failed "to discharge some duty necessary to safety". *Butler v. AeroMexico*, 774 F.2d 429, 430 (11th Cir. 1985). As previously set out, the mechanics failed to perform redundant safety checks which they knew were critical to the safety of passengers on the plane, and then falsified their work cards to show that they had performed the safety checks they knew they had not performed. They did not do this just once. They did it repeatedly for each safety check on each of three engines.

Despite this evidence, the Third District Court of Appeal concluded that Eastern was entitled to a directed verdict on the issue of willful misconduct. It held that the Florida Supreme Court's *Charles King* decision, a decision which applied a state law standard on the issue of intentional infliction of emotional distress to the federal question of "willful misconduct", was controlling.

> [B]ased on the controlling and indistinguishable authority of *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla. 1990), involving precisely the same near crash of the same Eastern Airline plane as involved in the instant case, it is plain that the defendant Eastern was entitled, as urged, to a directed verdict at trial on Ben King's claim for willful misconduct and to a limitation of damages

on his negligence claim to $75,000 under the Warsaw Convention.

561 So.2d at 1220-21.

The Florida Supreme Court, by a vote of four to three, denied review of this decision. The Kings now seek review in this Court.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE RULINGS OF THE FLORIDA COURTS AND THE RULINGS OF VARIOUS UNITED STATES COURTS OF APPEAL CONCERNING THE MEANING OF THE PHRASE "WILLFUL MISCONDUCT" AS USED IN THE WARSAW CONVENTION, AN ISSUE OF TREATY INTERPRETATION ON WHICH THIS COURT HAS NOT SPOKEN PREVIOUSLY.

The Warsaw Convention limits a passenger's recovery for damages sustained on an international flight to $75,000 unless the airline or its employees were guilty of "willful misconduct". "Willful misconduct", as used in the Convention, is a term of art on which there is substantial federal authority. However, for the first time, a state court has applied a state law standard for intentional infliction of emotional distress to the completely different federal issue of "willful misconduct" under the Convention, resulting in a standard which conflicts with that federal authority. This Court should consider this case because a state court of last resort has resolved a question of treaty interpretation in a manner which conflicts with the decisions of United States Courts of Appeals. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (court took jurisdiction to resolve conflict

between circuits concerning application of Warsaw Convention); *Air France v. Saks*, 470 U.S. 392 (1985) (court took jurisdiction to resolve conflict among courts of appeal concerning the meaning of the word "accident" as used in the Warsaw Convention).

In the federal courts, "willful misconduct" under the Warsaw Convention is well-defined. It means "a deliberate purpose not to discharge some duty necessary to safety". *Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985); *Koninklijke Luchtvaart Maatschappij N.V. v. Tuller*, 292 F.2d 775, 778 (D.C. Cir. 1961); *Am. Airlines v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949). It includes the intentional performance or omission of some act with a reckless disregard for its consequences. *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 536-37 (2d Cir. 1964); *Tuller, supra*, 292 F.2d at 778; *Pekelis v. Transcontinental & W. Air, Inc.*, 187 F.2d 122, 124 (2d Cir. 1950).

> [I]f the violation [of safety rules] was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences.

Ulen, supra, 186 F.2d at 533. *See also Grey v. Am. Airlines*, 227 F.2d 282, 285 (2d Cir. 1955) (willful misconduct is "intentional omission of a manifest duty" with knowledge that omission likely to cause injury or with reckless disregard of consequences).

The decision of the intermediate Florida appellate court here, which adopts the Florida Supreme Court's holding in the *Charles King* case, directly conflicts with the federal definitions and applications of the term "willful

misconduct". The Florida Supreme Court in the *Charles King* case initially determined whether the allegations of the complaint stated a cause of action for intentional infliction of emotional distress under state law. In holding that the complaint was insufficient, the court applied Restatement (Second) of Torts § 46 (1965) and the comments to it. In particular, the court relied on comment d:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous".

557 So.2d at 576. The court concluded:

> Applying these principles to the present case, it is clear that King has failed to state a claim for reckless or intentional infliction of emotional distress. The allegations that Eastern failed to properly inspect, maintain, and operate its aircraft rise no higher than negligence.

Id.[4]

The court then addressed Charles King's claim for damages in excess of $75,000 under the Warsaw Convention because of "willful misconduct". Here, the Florida Supreme Court confused the standards of "willful misconduct" under the Convention with the standards governing the claim for intentional infliction of emotional distress and the standards governing a claim for punitive damages under Florida law.

> We have already determined that King's allegations are not sufficient to support a claim for reckless or intentional conduct. *It follows that we must further hold that he has no basis to assert a claim alleging "wilful misconduct."* We reach this conclusion whether we apply the federal interpretation of "wilful misconduct," *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir.1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla.1984).

557 So.2d at 578 (emphasis added).

This holding was the basis for the Third District Court of Appeal's conclusion here that the Kings had not proven willful misconduct. And this is the holding which conflicts with the holdings of the federal courts.

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[4]The Florida Supreme Court recognized that this standard would require proof that Eastern would "recklessly or intentionally place its passengers, crews, and multimillion dollar airplanes in such peril" of crashing. 557 So.2d at 576. It noted that such a conclusion would be "incongruous". *Id.* Contrary to all federal cases on the issue, this reasoning would preclude a finding of willful misconduct in any major airplane crash because no airline would "recklessly or intentionally" place its planes in peril.

First, the state court rulings conflict with *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989),[5] another case which arose out of the same near-crash. The Eleventh Circuit in that case addressed the same complaint as that addressed in *Charles King*. It did *not* reach the same conclusion.

> While it is clear that Article 25 does not provide an independent basis for holding Eastern liable for punitive damages, *it is possible that the facts alleged here constitute willful misconduct* and serve to remove the liability limitations on compensatory damages of Article 22 and the Montreal Agreement.
>
> This question must first be addressed by the trial court on remand. Willful misconduct is a question of fact and should be addressed in the first instance by the district court. *Butler v. Aeromexico*, 774 F.2d 429, 432 (11th Cir.1985); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 135 (3d Cir.1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985). Determining whether willful misconduct occurred in a given case is an extremely fact-sensitive inquiry. The plaintiff has the burden of proving willful misconduct by the air carrier. [numerous citations omitted].

872 F.2d at 1489 (emphasis added).

Both *Charles King* and *Floyd* relied on the Eleventh Circuit's decision in *Butler, supra*. But only *Floyd* contains an accurate application of that decision. The *Butler* court

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[5]*Floyd* is before this Court. See n.3, *supra*. The issue under consideration is whether the Warsaw Convention provides recovery for purely emotional injuries unaccompanied by physical injury. Here, Ben King has sustained physical injury.

held that "willful misconduct" means "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage" or "reckless disregard of the consequences" or "a deliberate purpose not to discharge some duty necessary to safety". 774 F.2d at 430 (quoting *Koninklijke Luchtvaart Maatschappij N.V. v. Tuller*, 292 F.2d 775, 778-79 (D.C. Cir. 1961)). These definitions are obviously far different from the standards set out in *Charles King* as the governing *state* law on intentional infliction of emotional distress. Yet the Florida Supreme Court stated in *Charles King* that the two standards were the same. That conclusion is a substantial deviation from the governing federal law and cannot be left unrectified.

Application of the federal standard for willful misconduct under the Warsaw Convention, rather than the conflicting state court standard for intentional infliction of mental distress, would lead to a conclusion different than that reached by the Florida courts in this case. In *Butler*, the Eleventh Circuit concluded that there were sufficient facts in the record from which the district court properly inferred that the crew of the plane had "intentionally performed acts with knowledge that under the circumstances injury might result".

> Thus it is an inference sustained by substantial evidence that after the flight crew lost visibility and still had control, and could have aborted the approach, *they deliberately continued their descent, with knowledge that such procedure would probably result in injury to passengers.*

774 F.2d at 431 (emphasis added). This was sufficient to constitute "willful misconduct" under the Warsaw Convention.

The nature of the trial evidence here was no different. The mechanics violated every step of the required, critical safety procedure. They deliberately sabotaged the safeguards incorporated in that procedure by signing forms which stated that they had performed acts and run safety tests which they knew they had not done. The mechanics admitted they knew that their deliberate violation of the safety procedure was critical to the lives and safety of the passengers.

Butler is not alone. Federal appellate decisions which interpret the phrase "willful misconduct" have found sufficient evidence on facts far less egregious than those presented here. *E.g., Tuller, supra*, 292 F.2d at 775 (failure to instruct passengers as to location and use of life vests constituted willful misconduct although regulations did not require such instructions; willful misconduct "covers not only acts accomplished with deliberation, but also acts of carelessness without regard to the consequences"); *Pekelis, supra*, 187 F.2d at 124 (mechanic's failure to perform necessary safety check which would have determined that altimeter was faulty created jury issue on willful misconduct); *LeRoy v. Sabena Belgian World Airways*, 344 F.2d 266 (2d Cir. 1965) (crew reported plane's position to controller even though uncertain as to position to avoid delay which would have resulted if they had told the truth); *Ulen, supra*, 186 F.2d at 529 (violation of regulation which required planes to maintain altitude of at least 1,000 feet above highest obstacle within five miles of course sufficient to establish willful misconduct); *In re Korean Air Lines Disaster*, 704 F.Supp. 1135, 1147 (D.D.C. 1988) (violation of requirement that crew report problem with navigation equipment constituted "deliberate purpose not to discharge some duty necessary to safety").

The meaning of "willful misconduct" must be judged by federal law under a uniform standard. It is not judged by any

state law standard. *See Butler v. Aeromexico, supra*, 774 F.2d at 430. The federal courts have consistently set out the same standard and have consistently applied that standard. However, the Florida courts have now restated that standard in terms which suit Florida's own policies of recovery for state law claims such as intentional infliction of emotional distress or punitive damages.

The state law standard on intentional infliction of emotional distress requires conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". *Charles King, supra*, 557 So.2d at 576. But the federal standard of "willful misconduct" simply requires "a deliberate purpose not to discharge some duty necessary to safety" or "the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage". *Butler, supra*, 774 F.2d at 430. The two standards cannot be reconciled. The Florida Supreme Court was plainly incorrect in *Charles King* when it found that the analysis of willful misconduct under the Warsaw Convention "follows" from its holding on intentional infliction of emotional distress under state law. The state standard is not only inapplicable to, but inconsistent with, the federal standard for Warsaw Convention willful misconduct.

The issue is important. The Warsaw Convention is an international treaty, accepted by the United States and binding on the states. A primary goal of the Convention was "to secure uniformity of liability for air carriers". *Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984). "This uniformity interest applies not only internationally, but also within the United States as well". *Floyd, supra*, 872 F.2d at 1488; *Boehringer, supra*, 737 F.2d at 459. State law cannot be used to vitiate the purpose, requirements or goals of that

treaty. *See generally Floyd, supra*, 872 F.2d at 1480-88 (Warsaw Convention preempts state law inconsistent with its terms or goals). Conduct sufficient to sustain a finding of willful misconduct under the Warsaw Convention in the federal courts or in another state's courts must be sufficient to sustain a finding of willful misconduct under the Warsaw Convention in Florida. State law standards have no place in this analysis. This Court should review this case to affirm that the federal standard controls this significant issue.

CONCLUSION

For the foregoing reasons, Petitioners, Kevin King, as father and next friend of Ben King, a minor, and Kevin King and Mary Jo King, individually, respectfully request this Court to grant a Writ of Certiorari to review the judgment of the state court.

Respectfully submitted,

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Appendix

APPENDIX

EASTERN AIRLINES, INC., a Delaware corporation,

Appellant,

v.

Kevin KING, as father and next friend of Ben King, a minor, and Kevin King, individually, and Mary Jo King,

Appellees.

No. 88-2723.

District Court of Appeal of Florida,
Third District.

April 24, 1990.

On Motion for Rehearing June 26, 1990.

Before HUBBART, BASKIN and GODERICH, JJ.

PER CURIAM.

This is an appeal by the defendant Eastern Airlines, Inc. [Eastern] from a post-trial order granting a new trial on damages in favor of the plaintiffs in an action (a) brought by Kevin King, as father and next friend of Ben King, a minor, for breach of contract, negligence, and willful misconduct [Ben King's claim], and (b) brought by Kevin King, individually, for past and future medical expenses for Ben King, a minor [Kevin King's claim]. This entire action arose out of a near crash of an Eastern Airlines plane on a flight from Miami to Nassau. We affirm in part and reverse in part.

First, based on the controlling and indistinguishable authority of *Eastern Airlines, Inc. v. King*, 557 So.2d 574 (Fla.1990), involving precisely the same near crash of the

same Eastern Airline plane as involved in the instant case, it is plain that the defendant Eastern was entitled, as urged, to a directed verdict at trial on Ben King's claim for willful misconduct and to a limitation of damages on his negligence claim to $75,000 under the Warsaw Convention.[1] Eastern concedes, however, on this appeal that Ben King's damages were in excess of this amount, and, accordingly, we reverse the new trial order under review as to Ben King's claim and remand the cause to the trial court with directions to enter a judgment for the plaintiff on that claim in the amount of $75,000.

Second, as to Kevin King's claim, however, we find no merit in Eastern's appeal and affirm the new trial order under review solely as to this claim. Contrary to Eastern's extensive argument, we find no merit in Eastern's contention that the trial court should have ordered a new trial on both liability and damages as to the Kevin King claim; the trial court did not err (a) in admitting certain evidence at trial, (b) in its instructions to the jury, or (c) in granting a new trial on damages only. *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 815 (9th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 277, 107 L.Ed.2d 258 (1989); *Lawrence v. Florida East Coast Ry.*, 346 So.2d 1012 (Fla.1977); *Friddle v. Seaboard Coast Line R.R.*, 306 So.2d 97 (Fla.1974); *Cedars of Lebanon Hosp. Corp. v. Silva*, 476 So.2d 696 (Fla. 3d DCA 1985); § 90.703, Fla.Stat. (1987). Moreover, the trial court properly denied Eastern's post-trial motion to disqualify the trial judge; the motion was untimely filed, and, in any event, Eastern waived any right to complain about this ruling when it refused to agree to have the chief judge of the circuit hear the one motion remaining at the time of the hearing on the motion to disqualify. *Lightbourne v. Dugger*, 549 So.2d 1364,

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[1]In fairness to the trial court, it should be noted that the *King* case, which compels a reversal on Ben King's claim, was decided subsequent to the trial below—so that the trial court did not have the benefit of *King* when ruling on Eastern's various trial motions.

1365–66 (Fla.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1505, 108 L.Ed.2d 640 (1989); *Fischer v. Knuck*, 497 So.2d 240, 243 (Fla.1986); *In re Estate of Carlton*, 378 So.2d 1212, 1218 (Fla.1979) (Overton, J. on denial of request for recusal), *cert. denied*, 447 U.S. 922, 100 S.Ct. 3013, 65 L.Ed.2d 1114 (1980); *Ball v. Yates*, 158 Fla. 521, 533, 29 So.2d 729, 735 (1946), *cert. denied*, 332 U.S. 774, 68 S.Ct. 66, 92 L.Ed. 359 (1947); *see Lawson v. Longo*, 547 So.2d 1279, 1280 (Fla. 3d DCA 1989); *see also Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir.1988) (client bound by attorney's tactical decision to waive judge's offer of recusal), *cert. denied*, ____U.S. ____, 109 S.Ct. 3185, 105 L.Ed.2d 694 (1989); *State v. Hansen*, 107 Wash.2d 331, 728 P.2d 593 (1986) (en banc) (litigant waived right to disqualify judge for prejudice when trial judge offered to let another judge hear case and defendant rejected offer).

Affirmed in part; reversed in part.

ON MOTION FOR REHEARING

PER CURIAM.

Eastern Airlines, Inc. has filed a motion for rehearing in which it requests this court to determine whether Kevin King's claim is governed by the Warsaw Convention, and, if so, the extent of available funds under the Convention and the proper distribution thereof between the Ben King and Kevin King claims. This issue was neither presented in the parties' original or supplemental briefs nor orally argued, and we decline to address it for the first time on rehearing. *Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. 1st DCA 1985), *rev. denied*, 494 So.2d 1150 (Fla.1986); *Fiesta Fashions, Inc. v. Capin*, 450 So.2d 1128, 1129 (Fla. 1st DCA 1984); *Sarmiento v. State*, 371 So.2d 1047, 1053 (Fla. 3d DCA 1979), *approved*, 397 So.2d 643 (Fla.1981); *Price Wise Buying Group v. Nuzum*, 343 So.2d 115, 117 (Fla. 1st

DCA 1977). Although we decline to rule on the issue so raised, we do so without prejudice to Eastern's raising and fully arguing its position in the new trial on damages below, and we refer the trial court to the following relevant cases for consideration in its determination of the issue: *Diaz Lugo v. American Airlines, Inc.*, 686 F.Supp. 373 (D.P.R.1988); *Hinds v. Philippine Airlines, Inc.*, [1979 Transfer Binder] Avi.L.Rep. (CCH), 15 Avi. 17, 701 (S.D.N.Y.1979); *Ross v. Pan American Airways*, 123 N.Y.S.2d 263 (Sup.Ct.1953).

We have considered the other points in Eastern's motion for rehearing and find them without merit. The motion for rehearing is denied. In light of our decision on the Warsaw Convention issue, King's separately filed motion for clarification is likewise denied.

SUPREME COURT OF FLORIDA

KEVIN KING,

Petitioner,

v.

EASTERN AIRLINES, INC.,

Respondent.

Tuesday, January 8, 1991

CASE NO. 76,434

District Court of Appeal,
3rd District No. 88–2723

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, GRIMES and KOGAN, JJ., concur

SHAW, C.J., BARKETT, J. and EHRLICH, Senior Justice, dissent

A True Copy

TEST: (SEAL)

/s/
Sid J. White
Clerk, Supreme Court

EASTERN AIRLINES, INC.,

Petitioner,

v.

Charles KING,

Respondent.

No. 73395.

Supreme Court of Florida.

Feb. 15, 1990.

Rehearing Denied March 28, 1990.

GRIMES, Justice.

We review *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d DCA 1987), in which the Third District Court of Appeal partially reversed a judgment on the pleadings. Our jurisdiction is based on conflict with *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla.1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla.1985). Art. V, § 3(b)(3), Fla. Const.

The facts as alleged in the complaint were as follows. On May 5, 1983, the respondent, Charles King, was a passenger on Eastern Airlines' Flight #855 departing from Miami International Airport, bound for Nassau, Bahamas. En route one of the plane's three engines failed, so the flight crew turned the plane around to return to Miami. After turning around, the plane's other two engines failed. The crew and passengers were prepared to ditch the plane as it lost altitude. Finally, after an extended period, the crew was able to restart one engine and land the plane at Miami International Airport.

King sued Eastern Airlines for, *inter alia*, damages allegedly incurred as a result of Eastern's reckless or intentional infliction of mental distress and for damages arising under the Warsaw Convention.[1] Specifically, count III of King's amended complaint alleged that Eastern failed to properly inspect, maintain, and operate its aircraft and that "Eastern's records reveal at least one dozen prior instances of engine failures due to missing O-rings [oil seals], and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." King further alleged that this constitutes an "entire want of care" and "indifference" and implies "such wantonness, willfulness, and malice as would justify punitive damages." In count IV, King claimed damages under the Warsaw Convention by reason of this negligent or willful misconduct.

The circuit court stayed action in this lawsuit pending the outcome of related federal actions filed by other passengers in the United States District Court for the Southern District of Florida. The district court entered judgments on the pleadings in Eastern's favor based on the failure to state a cause of action. *In re Eastern Airlines, Inc. Engine Failure, Miami Int'l Airport on May 5, 1983*, 629 F.Supp. 307 (S.D.Fla.1986). Persuaded by the federal district court's reasoning, the state circuit court then entered a judgment on the pleadings in favor of Eastern and against King. On appeal a panel of the Third District Court of Appeal reversed and reinstated the claim for intentional infliction of mental distress but affirmed the dismissal of the claim for emotional distress under the Warsaw Convention. *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d DCA 1987). On motion for rehearing, the court again affirmed the dismissal of the Warsaw Convention claim but held that the

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[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following § 1502.

unavailability of a cause of action under the Warsaw Convention did not preclude other forms of relief. *Id.* at 1030, 1032. Thereafter, in a split vote on rehearing en banc, the court adhered to the decision but announced different reasons for reversing the dismissal of the state claim for emotional distress. *Id.* at 1032.

The related cases in federal court were appealed to the Eleventh Circuit Court of Appeals. That court relied on the Third District's decision in *King* to uphold the state claim for mental distress but noted that the issue was pending in this Court. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir.1989). The Eleventh Circuit Court of Appeals then concluded that the Warsaw Convention does allow recovery for purely mental injuries unaccompanied by physical trauma. *Id.* at 1480. Further, the court ruled that to the extent that the cause of action for intentional infliction of emotional distress under Florida law conflicts with the cause of action under the Warsaw Convention, Florida law was preempted. *Id.* at 1482.

This Court first recognized the tort of intentional infliction of emotional distress in *Metropolitan Life Insurance Co. v. McCarson*. In *McCarson* we approved the adoption of section 46, Restatement (Second) of Torts (1965), which states:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In that case, however, we held that the court below had not conformed its findings to the comments to section 46 which explain the application of the tort.

Comments d and i to section 46 are particularly pertinent to our consideration:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> . . . .
>
> i. *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts reckless, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

Section 500, Restatement (Second) of Torts (1965), provides:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which

> would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Comment b of section 500 further elaborates that "[c]onduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended. . . ."

Applying these principles to the present case, it is clear that King has failed to state a claim for reckless or intentional infliction of emotional distress. The allegations that Eastern failed to properly inspect, maintain, and operate its aircraft rise no higher than negligence. The fact that there may have been at least one dozen prior instances of missing O-rings causing engine failures does not reflect "extreme and outrageous conduct intentionally or recklessly" causing emotional distress. The balance of count III contains only conclusions. *See Price v. Morgan*, 436 So.2d 1116 (Fla. 5th DCA 1983) (a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action).

As *amicus* points out, it is incongruous that Eastern would recklessly or intentionally place its passengers, crews, and multi-million dollar airplanes in such peril. Our conclusion is reinforced by King's allegation that, despite Eastern's knowledge of the prior engine failures, Eastern failed to take "appropriate" procedures to correct the problem. Failing to take "appropriate" action to correct the problems would appear to negate an intentional act or an intentional failure to act on Eastern's part. Significantly, King's complaint does not allege that Eastern knew or should have known that the procedures were inappropriate.

The majority opinion below represents a misapplication of the principle established in *Metropolitan Life Insurance Co. v. McCarson*. Furthermore, as noted by dissenting Judge Schwartz:

> In essence, the majority view amounts to establishing an exception to the recently reaffirmed "impact rule," *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla.1985), which would arise in every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually "impacted" or physically injured by a product—like a Mustang or a Dalkon Shield—which may have been recklessly manufactured. Whatever the law of Florida may previously have been, see *Crane v. Loftin*, 70 So.2d 574 (Fla.1954) (dictum); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla.1950) (dictum), it is very clear that there is no such exception under the present law of our state.

536 So.2d at 1036–37 (Schwartz, J., dissenting).

While not the basis of our jurisdiction, we deem it appropriate to address the question of whether King has stated a cause of action under the Warsaw Convention. The Warsaw Convention is an international treaty to which the United States is a party. *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). The Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention art. 1. The Convention creates a presumption that the carrier is liable for damage sustained by passengers as a result of the carrier's conduct, shifting the burden of

proof to the carrier to show that it took all necessary measures, or that it was impossible to take such measures, to avoid the damage. Warsaw Convention arts. 17, 20. The Convention originally placed a limit of $8,300 on the carrier's liability. Warsaw Convention art. 22. Under the Montreal Agreement of 1966,[2] which is not a treaty of the United States, the airlines agreed to raise the limit of liability to $75,000 and waive the due care defenses of article 20 for flights originating, terminating, or having a stopping point in the United States. *Floyd*, 872 F.2d at 1468.

Article 17 of the Convention establishes the liability of international air carriers for injuries to passengers. The unofficial United States translation of article 17 states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3014, reprinted at note following 49 U.S.C. § 1502. However, the French text of the Warsaw Convention is the only official text and the one officially adopted and ratified by the Senate. *See Floyd*, 872 F.2d at 1470. The United States Supreme Court has held that the French legal meaning controls "not because 'we are forever chained to French law' by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399, 105 S.Ct. at 1342 (citation omitted). The French text of article 17 reads:

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[2]Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. 28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef au cours de toutes opérations d'embarquement et de débarquement.

Both parties conceded at oral argument that this case involved an "accident" occurring on board the aircraft. *See Saks*, 470 U.S. at 405, 105 S.Ct. at 1345 (accident defined as an "unexpected or unusual happening or event that is external to the passenger"). Therefore, the question we must address is whether the use of the language of article 17 was meant to encompass purely emotional distress.

The courts have sharply split on this issue. Those which permit recovery include *Floyd*, 872 F.2d 1462; *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y.1977); *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal.1975); *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238 (S.D.N.Y.1975); *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 672 (Sup.Ct.1978). Other courts have determined that article 17 does not contemplate damages for emotional distress unaccompanied by physical trauma. *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D.N.M.1973); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974).

After careful review and consideration, we are persuaded by the extensive and thorough resolution of this matter in *Floyd*. The *Floyd* court exhaustively examined the French legal meaning of the text, the concurrent and subsequent legislative history of the Warsaw Convention, the conduct of the parties, and the cases interpreting article

17.[3] The court determined that French civil law permits recovery for any damage, whether material or moral, including mental suffering unaccompanied by physical injury. *Id.* at 1472. We agree that the analysis of the cases which preclude recovery for emotional distress is flawed because those courts did not carefully consider the French legal meaning of *lesion corporelle* or the negotiating history of the Convention. *Id.* at 1476–78. In denying recovery, those courts have erroneously imposed upon article 17 the common law requirement that emotional injury must accompany physical injury in order to be compensable.

Because we found that King failed to state a claim under state law it is unnecessary for us to discuss whether a state law claim for emotional distress would be preempted by the Warsaw Convention. However, we will address his claim for damages in excess of $75,000 under the Warsaw Convention. Article 25 of the Convention states:

> (1) The carrier shall not be liable to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct.[4]

The Eleventh Circuit determined that article 25 did not provide a separate cause of action for punitive damages but instead served only to lift the strict limit on liability for compensatory damages in the case of wilful acts. *Floyd*, 872 F.2d at 1485.

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[3]The French words "lesion corporelle" are literally translated as "bodily injury."

[4]We use the English translation of this article since neither party has suggested an alternative French legal meaning. *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1462 n. 34 (11th Cir.1989).

We have already determined that King's allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "wilful misconduct." We reach this conclusion whether we apply the federal interpretation of "wilful misconduct," *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla.1984).

In conclusion, we disapprove the decision below with respect to both the state claim for emotional distress and that under the Warsaw Convention. We hold that King has failed to state a claim for emotional distress under Florida law. However, he does have a claim for emotional distress under article 17 of the Warsaw Convention but any recovery is limited to a maximum of $75,000. Article 25 of the Convention does not apply because the complaint fails to state a claim for "wilful misconduct." We remand the case for further proceedings in accordance with this opinion.

It is so ordered.

OVERTON, SHAW and KOGAN, JJ., concur.

EHRLICH, C.J., concurs specially with an opinion, in which SHAW and BARKETT, JJ., concur.

BARKETT, J., concurs specially with an opinion.

McDONALD, J., concurs in part and dissents in part with an opinion.

EHRLICH, Chief Justice, specially concurring.

I concur in all aspects of the majority opinion except the majority's approval of the following language quoted from Judge Schwartz's dissent in the decision below

> "In essence, the majority view amounts to establishing an exception to the recently reaffirmed 'impact rule,' *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla.1985), which would arise in every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually 'impacted' or physically injured by a product—like a Mustang or a Dalkon Shield—which may have been recklessly manufactured. Whatever the law of Florida may previously have been, see *Crane v. Loftin*, 70 So.2d 574 (Fla.1954) (dictum); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla.1950) (dictum), it is very clear that there is no such exception under the present law of our state."

At 576–77 (quoting 536 So.2d 1023, 1036–37 (Fla. 3d DCA 1987) (Schwartz, J., dissenting)). I write separately to point out the confusion or misunderstanding which I fear may be created by the quoted language. This quote should not be taken to mean that impact or a physical manifestation of psychological trauma is required in connection with the tort of intentional infliction of emotional distress.

This Court has long recognized the tort of negligent infliction of emotional distress where the distress is accompanied by physical impact. *See, e.g., Gilliam v. Stewart*, 291 So.2d 593 (Fla.1974); *Clark v. Choctawhatchee Electric Co-Operative*, 107 So.2d 609 (Fla.1958). More recently, in *Champion v. Gray*, 478 So.2d 17 (Fla.1985), and

Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985), we modified, in some limited situations, the requirement of an impact in connection with a claim of negligent infliction of emotional distress. However, in those situations where impact is unnecessary, a clearly discernible physical impairment must accompany or occur within a short time after the negligently inflicted psychic injury. 468 So.2d at 904; 478 So.2d at 17.

As noted by the majority, this Court first recognized the tort of intentional infliction of emotional distress by adopting section 46, of the Restatement (Second) of Torts (1965), in *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla.1985). While there must be impact or an objectively discernible physical manifestation before a cause of action arising from simple negligence may exist, no requirement of impact or physical injury is contained in section 46. In fact, comment k of that section states that the rule

> is not . . . limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.

Where the psychic injury is based on simple negligence, proof of impact or objective physical manifestation affords a guarantee that the mental distress is genuine. Whereas, the clearly outrageous nature of the conduct necessary under section 46 serves as adequate assurance that the resulting mental disturbance is not fictitious. *See* W. Keeton, *Prosser and Keeton on Torts*, §§ 12 & 54 (5th ed. 1984). This

distinction between causes of action based on negligent and intentional infliction of emotional distress was recognized by this Court in *Brown*. We noted that our holding in that case that there is no cause of action within this state for psychological trauma alone resulting from simple negligence was not intended to disturb prior decisions of the district courts allowing such damages in intentional tort actions based on outrageous conduct. 468 So.2d at 904 n. *.*

SHAW and BARKETT, JJ., concur.

BARKETT, Justice, specially concurring.

I concur in the Court's judgment that prior decisions would bar relief for the intentional infliction of mental distress in this case. I believe, however, that persons who have suffered great mental anguish through the extreme negligence of a tort-feasor, such as Eastern's in this case, should be permitted a remedy.

McDONALD, Justice, concurring in part and dissenting in part.

I would hold that King has no cause of action against Eastern under Florida law or under the Warsaw Convention unless his mental anguish evolves into an objectively discernible bodily injury similar to that described in *Champion v. Gray*, 478 So.2d 17 (Fla.1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla.1985).

In reaching this conclusion I am much more persuaded by *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D.N.M.1973), than I am by *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir.1989), even though the latter

*For this reason, I do not believe that this Court's decision in *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla.1985), is in conflict with the decision under review.

discusses the former. *Burnett* aptly points to the difference between *lésion corporelle* and *lésion mentale*. As the court further reported in *Burnett*, the First International Conference on Private Air Law had been interpreted to allow mental distress in a myriad of circumstances. It then noted:

> [T]he Conference appointed a group of air law experts who would report to the Second International Conference in Warsaw in 1929. The text they submitted became the mode for present Article 17 and it provided in pertinent part:
>
> > "Le transporteur est responsable du dommage survenu pendant le transport:
> >
> > (a) en cas de mort, de blessure ou de toute autre lesion corporelle subie par un voyageur."

By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

Concurring in this conclusion, Professor Juglart of the Law Faculty of the University of Paris has proffered the opinion that Article 17, as now constituted, does not permit recovery for mental injuries. He concludes that to so recover, the Article would have to undergo amendment to read "lesion corporelle ou mentale."

368 F.Supp. at 1157 (footnotes omitted).

It thus appears to me that some form of bodily injury must be the result of an airlines' wrong before there can be a recovery. I can not, and do not, equate mental stress to a bodily injury and do not believe it contemplated by the Warsaw Convention.

I concur with the majority opinion in reference to the discussion of Florida law, but dissent on the effect of the Warsaw Convention treaty.

WARSAW CONVENTION

Convention for Unification of Certain Rules Relating to International Transportation by Air

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier.

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

Chapter I. Scope—Definitions

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international

character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

Chapter II. Transportation Documents

Section I. Passenger Ticket

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Section II. Baggage Check

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage, check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Section III. Air Waybill

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have

been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceeding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by artes 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III. Liability of Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier,

whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the

court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where

he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV. Provisions Relating to Combined Transportation

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and

void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force is well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party, may at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

[Docket No. 17325; Order No. E-23680]

LIABILITY LIMITATIONS OF WARSAW CONVENTION AND HAGUE PROTOCOL

Order Approving Agreement

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention.[1] On November 15, 1965, the U.S. Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon 6 months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers, and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis

[1]The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement (Agreement CAB 18900) between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's economic regulations and assigned the above-designated CAB number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each

passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the U.S. Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The U.S.

Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 412 thereof:

It is ordered, That: 1. Agreement CAB 18900 is approved.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] Harold R. Sanderson,
Secretary.

[F.R. Doc. 66-5494; Filed, May 18, 1966; 8:49 a.m.]

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No. 90-1554

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEVIN KING, as father and next friend of BEN KING, a minor, and KEVIN KING and MARY JO KING, individually,
Petitioners,

v.

EASTERN AIRLINES, INC., a Delaware corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Florida

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE PROPER "WILLFUL MISCONDUCT" STANDARD AS USED IN THE WARSAW CONVENTION WAS APPLIED TO THIS CASE.

LIST OF ALL PARTIES TO THE PROCEEDING

The only persons and entities who have an interest in the outcome of this case are Petitioners and Respondent.*

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* In response to Rule 29.1, Respondent Eastern states that it is a subsidiary of Texas Air Corporation and that the following is a list of Eastern's subsidiaries: Airport Ground Services Corporation, Dorado Beach Development, Inc., Dorado Beach Estates, Inc., EAL, Inc., EAL Properties, Inc., Eastern Airlines Leasing, Inc., Eastern Airlines of Puerto Rico, Inc., Ionosphere Clubs, Inc., JCSS Corporation, Protective Services Corporation, Terminal Sales Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1554

KEVIN KING, as father and next friend of BEN KING, a minor, and KEVIN KING and MARY JO KING, individually,

Petitioners,

v.

EASTERN AIRLINES, INC., a Delaware corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Florida

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Eastern Airlines, Inc. ("Eastern"), respectfully requests that this Court deny the petition for writ of certiorari ("Petition"), seeking review of the opinion rendered in this case by the Third District Court of Appeal of Florida. The opinion is reported at 561 So.2d 1220 (Fla. 3d DCA 1990), *rev. denied*, 576 So.2d 288 (Fla. 1991).

STATEMENT OF FACTS

A. The Question Presented was neither raised in nor decided by the Florida Supreme Court.

Petitioners set forth the fact that the issue as to the proper standard of "willful misconduct" under the War-

saw Convention [1] was presented to the trial court and the Third District Court of Appeal of Florida ("Third District"). However, the Question Presented was not raised in the Florida Supreme Court. Rather, the *only* issue presented to Florida's highest court was whether the Third District correctly applied another decision, that of *Eastern Airlines, Inc. v. Charles King*, 557 So.2d 574 (Fla. 1990), under principles of *res judicata* and *stare decisis*. The Florida Supreme Court declined to address the aforementioned question.

B. Facts and Procedural History.

Petitioners, Kevin King, Ben King and Mary Jo King ("Petitioners"), brought suit against Eastern arising from an incident which occurred on Eastern's Flight 855 on May 5, 1983. Petitioners were passengers on board the flight which was travelling from Miami to Nassau, Bahamas, when one of the plane's engines failed and the flight crew turned the plane around to Miami. Subsequently, the plane's other two engines failed and the plane began to descend. The crew and passengers were prepared for the anticipated "ditching" of the plane when the crew was able to restart one of the engines. As a result of the crew's efforts, the plane safely landed at Miami International Airport.

At the time Mary Jo King was a passenger on Flight 855, she was pregnant with Ben King. Petitioners alleged that Mary Jo King's pregnancy was adversely affected by the flight resulting in Ben King's premature birth and allegedly permanent injuries as a direct result of Eastern's actions. Accordingly, they claimed that Eastern's conduct was "willful" under the Warsaw Convention. In all counts of the complaint, Petitioners al-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1970) (Warsaw Convention).

leged that Eastern breached its duty of care in transporting Mary Jo King "by failing to properly, adequately and safely service and maintain the aircraft used for Flight No. 855 by failing to install oil seals or 'o-rings'."

Petitioners' count for willful misconduct alleged that Eastern "failed to institute appropriate procedures to cure a maintenance problem of engine failures due to missing o-rings. . . ." Eastern moved for summary judgment, maintaining that because it had not acted with willful misconduct, damages should be limited to $75,000 pursuant to the terms of the Warsaw Convention.[2] Eastern demonstrated that it initiated numerous measures to insure that o-rings were being installed. Moreover, the evidence proved that Eastern did not intentionally fail to install the o-rings on Flight 855. Nevertheless, the trial court denied the motion. Eastern's subsequent motion for directed verdict, based upon the same evidence which demonstrated that Eastern's actions were neither deliberate nor intentional, was also denied.

The jury returned a verdict in favor of Petitioners in the amount of $706,203.99. Petitioners moved for a new trial on damages only and the trial court granted that motion, finding that the verdict amount was inadequate. Eastern appealed to the Third District on the ground that the award should have been limited to $75,000, the liability limitation under the Warsaw Convention, because Eastern's actions were not willful. The Third District agreed and reversed the award to Ben King[3] with directions to enter judgment in the amount of $75,000, based upon the Florida Supreme Court's indistinguishable holding in *Charles King*, which was decided on the same alle-

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[2] Article 25 of the Warsaw Convention provides that if a carrier's misconduct rises to the level of being "willful," the exclusions and limitations of the Convention do not apply.

[3] The Third District remanded the claim by Kevin King for a determination of his derivative damages. *Kevin King*, 561 So.2d at 1222.

gations as set forth in the complaint here. *Charles King* held that Eastern's actions had not been willful under either federal or Florida law. In making that determination, the Florida Supreme Court applied the federal standard enunciated in *Butler v. AeroMexico*, 774 F.2d 429 (11th Cir. 1985) and concluded that:

> [Plaintiff's] allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct." *We reach this conclusion whether we apply the federal interpretation of "willful misconduct,"* *Butler v. AeroMexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984).

Charles King, 557 So.2d at 578 (emphasis added). Accordingly, in following the directive of the Florida Supreme Court in *Charles King*, the Third District here concluded that the trial court should have directed a verdict on the issue of willfulness.

Petitioners sought discretionary review of this matter in the Florida Supreme Court, asserting that the Third District had erred in applying the *Charles King* holding to this case. The only basis for the argument was that the Third District, by applying *Charles King* here, had violated principles of *res judicata* and *stare decisis* announced by the Florida Supreme Court. Petitioners' brief to the Florida Supreme Court cited only state decisions in support of their argument. The Florida Supreme Court denied the petition for review.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED WAS NEITHER RAISED IN NOR DECIDED BY FLORIDA'S HIGHEST STATE COURT.

The sole Question Presented in the petition is whether the proper standard of "willful misconduct" was applied in this case. However, Petitioners did not raise this issue in the Florida Supreme Court. It is well-settled that when an issue was neither raised in nor decided by the highest state tribunal, there is a strong presumption against review by this Court. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 883 (1986); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Illinois v. Gates*, 462 U.S. 213, 217 n.1 (1983) (no jurisdiction where issue was neither raised in nor decided by highest state court); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (same); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 n.6 (1968) (same); *Beck v. Washington*, 369 U.S. 541, 553 (1962) (same); *White River Lumber Co. v. State of Arkansas*, 279 U.S. 692, 700 (1929) (same).

Indeed, the only question before Florida's highest state court was whether the intermediate appellate court here properly applied the holding of another case, *Charles King*, which arose out of the same incident on Eastern's Flight 855. The allegations concerning Eastern's purported conduct contained in the complaint in *Charles King* and the facts alleged in this case are identical. The determination that Eastern's conduct was not willful was decided in *Charles King* under both the *federal* and state standard. In this case, Florida's Third District was faced with a case which arose out of the same incident and involved *the identical conduct* of Eastern as that previously adjudged "not willful" in *Charles King*. Therefore,

the only task before the intermediate appellate court in this case was to apply the *binding precedent* of Florida's highest state court. *See Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (district courts of appeal are required to follow Florida Supreme Court decisions). The Third District, therefore, correctly followed the indistinguishable authority of *Charles King*.

Subsequently, Petitioners sought review in the Florida Supreme Court. At that time, Petitioners had the opportunity to ask the court to determine the application of the "willfulness" standard in this case. However, no such issue was presented. Ironically, now Petitioners argue that the issue here is "important." (Petition at p. 16). Manifestly, if the issue was so important, Petitioners would have raised it in the Florida Supreme Court. As they failed to provide Florida's highest state court the opportunity to consider the Question Presented here, the petition is not properly before the Court.

II. THE DECISION OF THE STATE COURT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT CONCERNING THE MEANING OF THE PHRASE "WILLFUL MISCONDUCT" AS USED IN THE WARSAW CONVENTION.

Petitioners have failed to demonstrate that the decision of the Third District conflicts with a decision of *any* other state or federal court. The only determination made in the Third District was whether the holding of *Charles King* applied. In *Charles King*, Florida's Supreme Court unanimously held that Eastern could not be found liable for willful misconduct *under either Florida or federal law*.

> [Plaintiff's] allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct." *We reach this conclusion whether we apply the federal interpretation of "willful misconduct," Butler v.*

> *AeroMexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984).

Charles King, 557 So.2d at 578 (emphasis added). As *Charles King* was indistinguishable from the case here, the Third District merely applied the holding of that case.[4]

Petitioners argue that this Court should determine that federal, not state, law applies to define "willful misconduct" under the Warsaw Convention. However, here, Florida's appellate court followed the binding pronouncement in *Charles King*, which *did* apply federal law in holding that Eastern's actions were not willful. In fact, *Charles King* applied the test enunciated in *Butler v. AeroMexico*, the very case which Petitioners ask this Court to apply. (Petition at p. 10; 12). In considering the same "well-defined" (Petition at p. 10) federal standard which has consistently been applied in *Butler* and other federal cases under the Warsaw Convention, the Florida Supreme Court found that Eastern's conduct did not constitute "willfulness." Accordingly, as the federal standard of *Butler* was applied, neither *Charles King* nor the decision of the Third District here, conflicts with any case.

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[4] The issue which Petitioners wish this Court to consider, whether federal law should be applied in determining "willful misconduct" under the Warsaw Convention, was not decided by the Third District here. Rather, the issue was considered and decided by the Florida Supreme Court in *another case* which is not before the Court, that of *Charles King*. The court in that case applied the federal "willful misconduct" standard and determined that Eastern's conduct did not rise to that level. Thus, Petitioners are actually improperly seeking review of the decision rendered in *Charles King*.

III. THE QUESTION PRESENTED ASKS THIS COURT TO RESOLVE A FACTUAL DISPUTE.

Petitioners' entire willful misconduct argument is predicated on the very same allegations that the Florida Supreme Court in *Charles King* determined were insufficient to demonstrate willful misconduct *under federal law*. It is evident from Petitioners' argument that they take exception to the *outcome* of *Charles King* which applied the correct federal standard enunciated in *Butler*. Petitioners thus seek a factual determination by this Court that Eastern acted willfully *in this case*. This Court has refused to grant certiorari to review questions of fact. *Massachusetts v. Sheppard*, 468 U.S. 981, 988-89 n.5 (1984); *United States v. Doe*, 465 U.S. 605, 613-14 (1984); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981); *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

Rule 14 of the Supreme Court Rules requires that a petition for writ of certiorari contain "a *concise* statement of the case containing the *facts material* to the consideration of the *questions presented*." Sup. Ct. R. 14 (emphasis added). Petitioners' extensive discussion of the facts is not material to the consideration of the Question Presented regarding the proper standard of "willful misconduct" under the Warsaw Convention.

Moreover, Petitioners' lengthy references to the facts, with citations to the record and trial transcript, demonstrates the lack of importance this case has to the general public, as contemplated under Rule 10.1.(c) of the Supreme Court Rules.[5] Petitioners' fact-specific presentation

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[5] In their pursuit to have the Court reconsider the state court's factual determination, Petitioners omit *any* evidence which demon-

illustrates that the issue presented is important only to the particular litigants. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) ("[a] federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . Special and important reasons imply a reach to a problem beyond the academic or the episodic.")

Petitioners concede that "determining whether willful misconduct occurred in a given case is an extremely fact-sensitive inquiry."[6] (Petition at p. 13). Indeed, as evidenced by Petitioners' "Parties to [the] Proceeding" page, "[t]he only persons and entities who have an interest in the outcome of this case are Petitioners and Respondent." (Petition at p. ii). Manifestly, this is not the type of issue worthy of this Court's review.

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strated that Eastern's actions did not amount to willful misconduct. Some of those facts, such as Eastern's actions in taking measures to correct the o-ring problem, are discussed in the Statement of Facts herein. However, as this brief is on the jurisdiction of the Court rather than one concerning the merits, Eastern will not indulge in a similar perusal of the particular facts of the case.

[6] Petitioners are correct that the opinion of the Eleventh Circuit Court of Appeals in *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989) demonstrates that the Question Presented here is fact-specific and must be decided on a case by case basis. (Petition at p. 13). However, Petitioners are incorrect to rely upon the Eleventh Circuit's opinion for any other reason, as that decision was reversed by this Court in *Eastern Airlines, Inc. v. Floyd*, 59 U.S.L.W. 4307 (U.S. Apr. 17, 1991), *reversing* 872 F.2d 1462 (11th Cir. 1989).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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NO. 90-1554

in the Supreme Court of the United States

OCTOBER TERM, 1990

KEVIN KING, as father and next friend of BEN KING, a minor, and KEVIN KING and MARY JO KING, individually,

Petitioners,

vs.

EASTERN AIRLINES, INC., a Delaware corporation,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent Eastern Airlines, Inc. raises three points in opposition to the Petition for Writ of Certiorari. Each is premised on an inaccurate statement of the proceedings and holdings below.

ARGUMENT

I.

THE QUESTION PRESENTED WAS PROPERLY RAISED IN THE FLORIDA COURTS.

First, Respondent contends that any issue concerning the phrase "willful misconduct" as used in the Warsaw Convention has not been preserved because it was not raised in the Florida Supreme Court. This contention is without merit because this federal issue was fully litigated in the Florida district court of appeal. The Florida Supreme Court did not consider the case on the merits, but simply declined to accept jurisdiction to review the decision of the district court of appeal on the merits. Under these circumstances, the federal issue has been fully litigated and properly preserved.

Respondent ignores the structure of the Florida appellate courts. Florida has a two-tier system, with five district courts of appeal and a supreme court. The district courts of appeal are not "intermediate" appellate courts but "are courts primarily of final appellate jurisdiction". *Jenkins v. State*, 385 So.2d 1356, 1358 (Fla. 1980). The Florida Supreme Court does *not* have discretionary jurisdiction to review any district court of appeal decision. As pertains to this case, the Florida Supreme Court's jurisdiction is limited to a district court of appeal decision which "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law". Florida Const., art. V, § 3(b)(3); *Jenkins v. State, supra.*

Further, Florida Supreme Court review is a two-step procedure. First, petitions are filed "limited solely to the issue of the Supreme Court's jurisdiction". Fla.R.App.P. 9.120(d). Briefs on the merits are filed only after the Supreme Court decides to accept jurisdiction. Fla.R.App.P. 9.120(f).

Here, the Florida Supreme Court simply declined to accept jurisdiction. (App. 5). No occasion or opportunity existed to present to the Florida Supreme Court the issue now before this Court. Under those circumstances, it is the merits of the Florida district court of appeal decision, not the jurisdictional decision of the Florida Supreme Court, which is properly before this Court. *Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 237 n.1 (1967).

In sum, the federal issue raised in the Florida district court of appeal and presented to this Court does *not* constitute a basis for Florida Supreme Court jurisdiction. It could not have been raised in the Florida Supreme Court jurisdictional briefs. The failure to raise that which could not have been raised does not waive the right to seek review in this Court.

II.

THE DECISION OF THE STATE COURT BELOW DOES CONFLICT WITH OTHER COURTS CONCERNING THE MEANING OF THE PHRASE "WILLFUL MISCONDUCT" AS USED IN THE WARSAW CONVENTION.

Respondent claims that the state courts applied the proper standard for "willful misconduct" because those

courts cited *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), as support for that standard. Respondent misses the point. Although those courts cited *Butler*, they then went on to apply a completely different standard—the state law standard required to support a claim for reckless or intentional conduct.

> We have already determined that King's allegations are not sufficient to support a claim for reckless or intentional conduct. *It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct".*

557 So.2d at 578.

This Court need merely compare the state law standard to support a claim for reckless or intentional conduct with the federal standard for "willful misconduct" under the Warsaw Convention. The state law standard is clear. A claim exists

> only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

557 So.2d at 576. The federal standard for "willful misconduct" is also clear. It means "a deliberate purpose not to discharge some duty necessary for safety". *Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985). See also cases cited in Petition at 10. The two standards are not the same. The conflict is patent.

III.

THE QUESTION PRESENTED DOES NOT ASK THIS COURT TO RESOLVE A FACTUAL DISPUTE.

Respondent asks this Court to deny the Petition because the resolution of "willful misconduct" under the Warsaw Convention is ultimately a factual issue. As detailed above, this case is not about a factual dispute. If the Florida courts had resolved the issue of "willful misconduct" utilizing the proper federal standard, review would not be appropriate in this Court. But the Florida courts did not do that. Instead, they announced a new and fundamentally different standard for "willful misconduct" under the Convention, a state law standard which has no place in any proper analysis. Although it is not the role of this Court to review factual disputes, this Court is and should be the final arbiter of disputes concerning the interpretation of an international treaty. Resolution of that dispute will affect not only the litigants in this case, but the rights of all passengers and airlines involved in international flight.

CONCLUSION

For the foregoing reasons, Petitioners, Kevin King, as father and next friend of Ben King, a minor, and Kevin King and Mary Jo King, individually, respectfully request this Court to grant a Writ of Certiorari to review the judgment of the state court.

Respectfully submitted,

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